UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UMB BANK, N.A.,

Plaintiff,

v. 15 CV 4634 (SAS)

CAESARS ENTERTAINMENT CORPORATION,

ARGUMENT

Defendant.

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New York, N.Y.
July 23, 2015
11:07 a.m.

Before:

HON. SHIRA A. SCHEINDLIN,

District Judge

APPEARANCES

KATTEN MUCHIN ROSENMAN
Attorneys for Plaintiff
BY: DAVID A. CRICHLOW

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BY: NATAN HAMERMAN
DANIEL EGGERMANN
SAMANTHA V. ETTARI

THE COURT: Mr. Eggermann.

MR. EGGERMANN: Yes.

THE COURT: Oh, Mr. Hamerman.

MR. HAMERMAN: That's me, your Honor.

THE COURT: And Ms. Ettari.

MS. ETTARI: Yes.

THE COURT: And --

MR. CRICHLOW: I'm Mr. Crichlow, your Honor.

THE COURT: Mr. Crichlow. Okay.

Ms. Gueron.

MS. GUERON: Yes.

THE COURT: Mr. Crowell.

MR. CROWELL: Yes.

THE COURT: Okay. I have two letters here: A July 13th letter from Mr. Hamerman, who's here. And he would like permission to file a motion to quash subpoenas that have been issued on his clients and, he says, and/or for a protective order. His clients are nonparties to this matter. He refers to them in the letter correctly as collectively the first lienholders.

And the subpoenas that have been served are served by CEC, which is Caesars Entertainment Corp., a defendant in the UMB action, which is the action we are here on. And Mr. Hamerman says these subpoenas, which call for documents and depositions, are overly broad, they don't seek relevant

information, and if both of those arguments were to fail, he then says you shouldn't allow it now until you decide the pending summary judgment motion.

Then I have a letter dated July 16th in response from Mr. Gueron, representing CEC. And she says you should allow the subpoenas as issued; they do seek relevant information; they are not overbroad. The first lien noteholders are the real party in interest here. We have no other way of really getting at the discovery. It's a very tight discovery schedule.

Our response to the pending brief is due tomorrow, Friday, July 24th. Discovery is set to close August 31st; so a stay doesn't do any good because the discovery deadline will occur. We are prejudiced if you don't allow it. And most of all, the Delaware chancery court had an identical motion to quash virtually identical subpoenas. And under Delaware law -- which tracks pretty much Rule 26(b)(1) of the federal rules -- the Court declined to quash the subpoena.

So I think that's a fair summary of the two letters.

I would also note that in addition to the materials that the parties submitted, which included the order of the Delaware court and included the subpoenas, yesterday the bankruptcy judge in the Northern District of Illinois declined to stay the actions that are pending before me, I think there are five of them, and the Delaware action in the Delaware

chancery court. So we have to go forward with this application today.

I am prepared to make an oral ruling, which I intend to follow up with a written ruling, but I'm happy to hear from the parties before I do that, if you wish.

So since it is your proposed motion, Mr. Hamerman, if you wish to be heard, that's fine.

MR. HAMERMAN: Thank you, your Honor. I do.

Good morning, your Honor. Natan Hamerman from Kramer, Levin, Naftalis & Frankel for the five subpoenaed nonparties.

We requested this conference, as your Honor mentioned, to seek permission to move to quash and make a motion for a protective order. And the Court has obviously read the letter, so I'll try to be as concise as possible.

I'd like to address three things. First, I'll take hopefully no more than 90 seconds to summarize our position on the proposed motions.

THE COURT: Don't bother if it repeats exactly what I just said.

MR. HAMERMAN: No problem, your Honor. I'll skip ahead then.

THE COURT: Unless it has something different in summary.

MR. HAMERMAN: It is clear your Honor has reviewed it; I'm happy to --

THE COURT: I did. I was interested in the issue; I'm interested in the problem; I'm interested in these cases. So I did take the time to review it, including reading yesterday's interesting order of the bankruptcy court. So I think I'm up to speed, but I'm happy to hear the argument.

MR. HAMERMAN: Very good.

I'm going to then talk about two things.

I'll scratch the intro.

THE COURT: Okay.

MR. HAMERMAN: The second thing I was going to talk about -- now the first -- was the burden on the nonparties, which I'll address. And the next topic I'll address is responding to some of the points raised in CEC --

THE COURT: Both of those will be helpful.

MR. HAMERMAN: Of course, your Honor, if you have questions throughout, I'll answer them, or I'll do my best, anyway, to answer them or answer them at the end.

So let me just skip right over to burden.

It is obviously our position that the subpoenas seek irrelevant information and, therefore, any burden would be too much. But, your Honor, that's not just a minimalist approach; in fact, the subpoenas are very burdensome, and that reinforces why they should be quashed.

Since the time we filed our letter, we've spoken with our clients about the burden that would be imposed by the

subpoenas. We tried to get estimates from them concerning the universe of documents that would need to be collected and reviewed in response to the subpoenas. We asked in particular for estimates with respect to emails of the top one or two custodians at each client, the people who likely would have sent, received, or been copied on the bulk of the documents.

Although it is difficult to estimate, in the absence of agreed-upon parameters and search terms, we preliminarily estimate that if these nonparty subpoenas are not quashed or substantially modified, it will be necessary to review upwards of 200,000 emails.

Now, this doesn't include attachments to the emails, and it also does not include non-email documents, both of which will move the actual number higher. And it also does not include any documents responsive to Request No. 12, which we mentioned in our letter. That one seeks all documents and communications concerning the release, termination, expiration, effectiveness or enforceability of any guaranty on any corporate debt security. That request is not limited to Caesars' first lien bonds at all; and, frankly, some of our corporate bond trading clients were simply awestruck at the expansiveness of that request, which cuts across so many of their positions.

Just to put this in perspective, your Honor, my understanding, both from experience and from speaking with

others, is that a document reviewer typically reviews roughly 500 to 1,000 documents a day. That means to review roughly 200,000 emails takes between 200 to 400 attorney workdays. That's what, roughly speaking --

THE COURT: Why wouldn't you use technology-assisted review these days?

MR. HAMERMAN: We would certainly use as much technology as we could, your Honor. Our clients would certainly expect -- particularly because of the privilege issue, which I'm about to discuss, that we would take our time to review these documents. But we would certainly employ whatever technologies we could to reduce the burden.

As I mentioned, it is not a precise estimate; the numbers would likely go up and they would likely go down because of search terms, technologies, additional documents, and all of the like. It gives you a rough sense of magnitude. Obviously if you add Request No. 12, we would be talking about orders of magnitude higher.

Two other points on burden. One, the privilege issue, which I was just mentioning.

Our clients have been working very closely with us and with other counsel during most or all of the time period covered by the subpoena. Therefore, we expect that a large portion of these emails and other documents will be privileged.

And the necessary privilege --

THE COURT: I'm sorry, what privilege?

MR. HAMERMAN: Attorney-client privilege, attorney work product privilege or immunity. Of course, we have some common interest issues. So those would be the privilege that we would be thinking about most notably.

Many of the documents are also proprietary, calling for confidential information. I'm sure there's a confidentiality order; I think it was entered yesterday. But, nonetheless, that requires additional review and careful consideration of how to label documents and things of that nature.

THE COURT: Let me ask you an unorthodox question.

MR. HAMERMAN: Yes, your Honor.

THE COURT: Very unorthodox.

If you were CEC and you were seeking the documents, how could you draft this narrowly and cut your search enormously and give them the minimal amount of what they really need to see? In other words, it is very unorthodox, because clearly I'm asking you to switch roles, but your argument is, at least initially, quash everything; don't allow any discovery.

I'm wondering if there's a kernel, a narrow portion, that even you think maybe they are entitled to; and if it were structured that way, you might be able to get at. They say you are the real party in interest. They say.

Certainly you have a great interest, and with it the guaranties were vacated, amended in some way that's appropriate or inappropriate; and you may have correspondence regarding the initial thoughts on those guaranties, even though you say you weren't there for the negotiations. There may be documents that show how you understood them, how you didn't understand them, what you thought of them, which I know you argue is subjective and irrelevant anyway. But I'm just saying, what's the kernel of all of this? K

THE WITNESS: Some of the requests, No. 12, for example, seem terribly out of line, I agree with you already. But there might be something here that they really are entitled to. What might that be? Very unorthodox question, but tell us what might that be.

MR. HAMERMAN: It's a perfectly reasonable question; in fact, it's a question we talked about in our meet-and-confer. And we offered them before we knew, for example, that our clients had not been involved in negotiations. We said to them, If there is evidence of negotiations --

THE COURT: That you say there's not. So now we're back to zero. So what is there?

MR. HAMERMAN: Well, we are not back to zero.

That's a legitimate request. Negotiations, we don't have it. That's an answer; that's not, We're not going to give

you anything. We don't have it.

THE COURT: I don't want to talk over you because it makes it hard for the reporter.

You don't have any because you say you weren't involved in the negotiation. So that doesn't help me know what you might have that might be relevant.

MR. HAMERMAN: Okay.

So beyond the negotiations, the other topic that could be pertinent is if we had been involved in the transactions, which we were not, so there again is a zero.

And then finally, I think, if there were communications with the parties to the indenture, that limited universe could potentially show parol evidence or other evidence relating to the transactions, for example, that could potentially be relevant or lead to relevant evidence.

Now, with respect to that, we are aware that CEC has already subpoenaed UMB to provide that information.

THE COURT: UMB seems to have next to nothing because of their role; what they are is as a successor.

What might you have in the subject area you just described? How could you search for it, how burdensome would that be, how fast can you come up with it, and if there was a deposition, who would be the deponent?

MR. HAMERMAN: I think we are talking about communications with UMB, which UMB doesn't say they have

nothing; they say they have not a lot. And that's the same universe of documents that we are talking about. I don't know of any others, for example, with the draftsmen of the indenture. We are under the impression that we don't have any of those. Had there been, that's what we would be looking for, and that would be potentially appropriate here.

THE COURT: And if there was a deponent, who would that be?

MR. HAMERMAN: It would be the person who had the communications with UMB, I guess. That would be for the purposes of talk about UMB's position. They are the party. They are the party and, therefore, potentially their admissions, their statements might be pertinent here.

And let me answer then also, your Honor, the issue of the real parties in interest, because that was a position that your Honor seems to have taken an interest in and, of course, CEC mentioned.

Our view is that that is a nice turn of phrase, but it's really all it is. We are not parties in any legally significantly way; we are not parties to the litigation. Our statements that CEC wants in discovery are not party admissions. We are not parties to the indenture; we are not parties to the negotiation of the indenture; we are not parties to the transactions at issue in the litigation; we are not party to the negotiation of those transactions.

We are not a typical third party like an auditor who audited financial information of a party who's accused of financial shenanigans. That's not what we have here.

We are outsiders. We do hold an economic interest, that's certainly true, your Honor; but so do thousands of other noteholders. And that we have an economic interest doesn't make our --

THE COURT: You have a huge economic interest. You stand to benefit enormously, depending on the outcome of this litigation.

MR. HAMERMAN: There is no doubt that we do have a significant economic interest, your Honor. But that doesn't mean that our --

THE COURT: That would turn, to some extent, on the outcome of these litigations.

MR. HAMERMAN: That's true. We have an economic interest in the outcome of the litigation. That doesn't make us parties.

THE COURT: Let's not set up straw men and knock them down. You're not parties, I get that. I didn't start the job yesterday. I know you're not a party. I can read a caption. You're nonparties.

Rule 45, of course, permits discovery of nonparties if they have relevant information, of course. Telling me over and over again you're not a party is not helpful. I get that.

But do you have information that is relevant to the issues that need to be resolved in this case and, if so, what is it; and, if so, when does it need to be produced. That's the way to look at it.

MR. HAMERMAN: Okay. We don't think we have information relevant for the reasons I've mentioned. And if we do, it's extremely limited. It's, in our view, already being produced by UMB.

THE COURT: That's sort of late in the game, isn't it? When UMB arrives, isn't that late in the storyline here? Wouldn't you have material that predates that about the guaranties themselves and negotiating the guaranties and then the effort to withdraw the guaranties? Aren't you part of some of those activities that predate UMB?

MR. HAMERMAN: Let me try to break that down into pieces.

THE COURT: Okay.

MR. HAMERMAN: First, there is the time period in which the indentures were actually negotiated, right. And in particular, the first indenture here was negotiated in 2009 or was entered into in 2009; it may have been negotiated in 2008.

THE COURT: Right.

MR. HAMERMAN: And those are the key communications, if there are any.

THE COURT: Right. You don't have them.

MR. HAMERMAN: We were not involved, and so we don't have those communications.

THE COURT: Okay. But that all predates UMB.

When did UMB come into the picture?

MR. HAMERMAN: In 2014.

THE COURT: That's what I thought.

MR. HAMERMAN: So you're right, those communications, which predate UMB's involvement, could potentially, I agree -- because we don't know yet whether the contract is clear or ambiguous, those communications would be legit for discovery.

THE COURT: But you say you don't have any.

MR. HAMERMAN: Correct.

THE COURT: When did you become a noteholder?

MR. HAMERMAN: Our clients became noteholders on different dates. I don't have all of those dates at our fingertips.

THE COURT: No, but you know the range.

MR. HAMERMAN: From the beginning through today.

THE COURT: So from 2009 through '14.

MR. HAMERMAN: Certainly.

Nonetheless, not every noteholder is involved in negotiating the indenture or is involved in structuring the indenture.

THE COURT: I didn't say everyone was. But if any of the five are, any of the five had correspondence regarding

guaranties and the purpose of the guaranties and the scope of the guaranties, the ability to undo the guaranties, it's all about the guaranties.

MR. HAMERMAN: I agree, your Honor.

If our clients had that information, that's the type of information that would be discussed in the negotiation of the indenture. And if our clients had been involved in that, that could be a pertinent area that would potentially at least lead to admissible evidence.

THE COURT: Well, then the sale later of the five percent that leads to undoing the guaranties, where are your clients in all of that?

MR. HAMERMAN: So our clients are observers of that, but we were not involved in those transactions; and, therefore, their opinions about those transactions are really just opinions. They are not facts. They are opinions.

THE COURT: I understand that. They are subjective. I get that.

MR. HAMERMAN: Right.

So they are layperson opinions.

If we had been involved -- we weren't the auditors, we were the lawyers -- we would agree that that information should be produced. But we are not. And we don't have that. We only have our observations and our assessments of those transactions.

THE COURT: How about the decision to invest in the first place? Was it dependent on the guaranties? Was that a motivation for investing in the first place? Are there records that would show something along those lines?

MR. HAMERMAN: I think that that information -- there's certainly information the clients have about why they made certain -- typically there's information about why clients make investments, but that doesn't go, in our view, to the issues in the case.

The issues in the case are was there a breach of the indenture. That turns on the language of the indenture and, therefore, the parties' intent in negotiating the indenture. And it goes on what happened in the transactions.

Our clients' subjective assessments of why they made investments don't go to either of those two things. And that's highly proprietary information for our clients that we are deeply concerned about having to review, produce, and share the crown jewels of many of these entities.

Let me talk for a moment, your Honor, about some of the other objective evidence that they have mentioned, things like market analyst reports. This is information that's not proprietary to us, although we may have contracts keeping them confidential and things of that nature. But, again, we don't think this is really objective evidence. These are not facts about the transactions. These are third-party assessments of

what occurred. And, therefore, we don't think that would be fair game either.

We think it's also improper to burden five nonparties with trying to go and find publicly-available analyst reports. That does not seem to us like an appropriate use of Rule 45 or even 26. That's another category of objective data that they mention.

Let me talk for a moment about Delaware.

Look, respectfully, we think that Vice Chancellor Glasscock got it wrong, but I'll add another couple of points.

The transcript of that argument was annexed to the letter by CEC. And I couldn't help but remark how, frankly, different our position was. The majority of the argument by the two L's in Delaware focused on trying to get the Court to decide that day that the contract was clear and unambiguous.

I don't think that your Honor is going to do that, and so I'm not even going to ask. But we don't think that matters. We don't think it matters if the contract is clear, if the contract is ambiguous, or that the discovery is relevant to determining whether or not the contract is ambiguous. And therefore, our position is different from theirs.

Because we've already confirmed, for example, that --

THE COURT: I'm sorry, "theirs." Who is "theirs"?

MR. HAMERMAN: The two L's in Delaware.

THE COURT: Two L's.

MR. HAMERMAN: The proponents of the motion to quash in Delaware.

THE COURT: What is two L's?

MR. HAMERMAN: Second lean noteholders. I'm sorry.

THE COURT: Oh, you have a shorthand.

MR. HAMERMAN: I have a shorthand. I'm sorry.

THE COURT: Maybe I should have known that already, but I didn't.

MR. HAMERMAN: So in Delaware, the second lien noteholders made a motion to quash. And their position was that the Court should decide right there and then that the contract was clear and unambiguous.

Our position is different than that. We recognize that that's not likely to occur, and we don't think it needs to occur for purposes of adjudicating our application.

And in particular, because we already confirmed that we weren't involved in the negotiations of the indenture or involved in the 2014 transactions, we think that the potential scope of relevant information or information that could lead to relevant evidence, we just don't have it.

In Delaware, the second lien attorneys apparently couldn't say anything or didn't say anything about burden. Here, we've now talked about that.

In Delaware, they didn't have anything to say about specific requests; it was an all-or-nothing approach. Here, we

do have concerns about specific requests; we do have concerns about legal communications and proprietary communications. So we've addressed that, as well.

And, of course, the summary judgment application, which you mentioned, your Honor, in Delaware, the court was concerned that it would not be able to rule on anything for some time. Here, there is at least a possibility that your Honor is going to be ruling on this soon and, therefore, all of this effort may be for naught.

Although I didn't see it in the letter here, in the Delaware oral argument, CEC took a position about subjective evidence.

THE COURT: About subject --

MR. HAMERMAN: Subjective opinions of parties.

THE COURT: That's in the letters here.

MR. HAMERMAN: If it is, I hadn't noticed it.

THE COURT: It's all over.

MR. HAMERMAN: Our letter addresses subjective evidence.

THE COURT: Yes. I'm sorry.

MR. HAMERMAN: But in CEC's letter I didn't see a response to that.

THE COURT: Fair enough.

I know I read about it. It was your cases that said subjective. The comments are irrelevant anyway. Custom and

practice has to be fixed; it has to be the established practice, not subjective. So I knew I read about that issue.

MR. HAMERMAN: As I was saying, CEC took the position in Delaware that there are certain circumstances when subjective evidence can be admissible or can be relevant. For example, although it's not evidence used to interpret ambiguity, it could be used, for example, to impeach a witness, or it could be used, for example, to illuminate a witness's objective communications back and forth about the intent of the parties.

What that's about is not applicable here. What those cases are saying is that if you are trying to discern the intent of the parties to the contract, there are certain circumstances when this subjective evidence might come into play. Since we were not involved, and since we are not parties, and we are not parties to the indenture, and we are not involved in the negotiation, we do not think that even those limited unique circumstances could be applicable here.

All that's being asked for here, in our view, is not really the intent of the parties to the contract; it's the after-the-fact subjective opinion of noncontracting parties.

(Pause)

THE COURT: Maybe you've covered all your points.

MR. HAMERMAN: Maybe.

THE COURT: Okay. Do you think so?

You're checking your notes.

MR. HAMERMAN: I'm just checking my notes.

THE COURT: Right.

MR. HAMERMAN: A couple of other minor points, and I'll try to go through them as quickly as I can.

THE COURT: Well, you will go through them quickly because I think enough time has been spent.

What are the minor points?

MR. HAMERMAN: There is an argument that UMB in their complaint says the guarantee remains in full force and effect and, therefore, they need discovery of the noteholders about that.

We think the statement that the guarantee remains in full force and effect is a legal conclusion ultimately that your Honor is going to have to decide. Our opinion on that subject simply does not matter.

And unless your Honor has other questions, I'll let it go.

THE COURT: No. I'm done.

MR. HAMERMAN: Thank you.

THE COURT: Ms. Gueron.

MS. GUERON: Thank you, your Honor.

Where we'd like to start is with the complaint in this case, because that seems like the place to start.

The relief that the first lien noteholders are asking

for and the process they are asking the Court to engage in is really backwards. So they are saying, Prejudge the legal issues; deem these documents inadmissible and, therefore, we won't have to produce them.

But let's look at the complaint.

As your Honor pointed out already, the parent guaranties and the release of the parent guaranties are central to this case.

What does the complaint say?

The complaint says at paragraph 47: "The CEC guarantee was essential to the consideration received by the first lien noteholders in agreeing to extend credit under the first lien indentures."

The complaint says at paragraph 10: "CEC's release of that guarantee has effectively robbed the noteholders of the benefit of their bargain."

THE COURT: Referring to the first lien noteholders?

MS. GUERON: Yes.

THE COURT: But their point is maybe they were robbed, maybe they weren't robbed, but they weren't any part of the negotiation of that release. He said, We are out of it. We had nothing to do with that.

First half of what you said, first thing you quoted, would you quote that again.

MS. GUERON: Certainly.

It's paragraph 47, and it says: "The CEC parent guarantee was essential to the consideration."

THE COURT: Okay. Stop. Stop.

So that I talked to them about. Why did you invest in this in the first place; were the guaranties essential; do you have correspondence about those guaranties.

I understand that that allegation is in the complaint and that, therefore, they may have relevant evidence about that, but I don't know if that's the issue now, why they invested then, the guaranties were important to them then. UMB can put it in the complaint; that doesn't make it an issue that's really something to be adjudicated in this case. The release, yes, the release, but they say they have nothing to do with that. That's what they said. We weren't part of those negotiations. If we had those documents, Mr. Hamerman said, we would concede that that would be something that you'd be entitled to. But we don't have them. We weren't part of any negotiations.

MS. GUERON: Well, your Honor, the idea that they have no documents relating to the meaning --

THE COURT: I didn't say that. To the release of the guaranties. The second paragraph in the complaint that you quoted. You quoted two parts so far.

MS. GUERON: Yes.

THE COURT: First was getting into the deal, and the

second was the release.

MS. GUERON: If I might quote some more about the release.

The complaint also alleges: The parent guaranty remains in full force and effect.

THE COURT: That's what UMB says, yes.

MS. GUERON: Right. And so again, the subpoenas are seeking in the familiar formula all documents about the parent guaranty, all documents about the release. And this is relevant because, your Honor --

THE COURT: Yes, but what do they have about the release? They may have an opinion about it. They weren't part of that release. I asked them that during the questioning. I said, Were you part of that sale of the five percent? CEC says it's no longer on the hook.

He says, We're not a part of it. We had no role in that. We had no part in that. We didn't negotiate. We may have a view as to how it affects us; we may, in fact, agree with this complaint. But these guaranties were made in full force and effect. But so what?

MS. GUERON: So what they may have -- and, of course, we don't know, because there hasn't been discovery yet.

THE COURT: Right.

MS. GUERON: All the cases that they are citing are post discovery, summary judgment or post trial, where we are

dealing with admissibility, not producibility.

THE COURT: Yeah, yeah, go on.

MS. GUERON: But what they may well have, what they surely do have, is the markets analysis objectively and their internal analysis of what is the meaning of the parent guarantee, what is the meaning of the release provisions.

THE COURT: In the first place. In the first place, when they first entered into the transaction?

MS. GUERON: Or when they decided not to sell. When they bought, held, decided not to sell, decided to sell. Their internal analyses and the market evidence that they have from other --

THE COURT: Wait. Let's talk about those internal analyses.

I'm struggling to understand how they are sort of internal thoughts and correspondence within the company, which is really their opinion. Should we do this, should we do that, we think the guaranties are in effect, we think they are not. What evidence is that objectively that I'm interested in?

MS. GUERON: Because, your Honor, the contracts -- it is our position, and you have not ruled on this issue, the contracts are ambiguous.

THE COURT: There you go. Now we get to the heart of your subpoenas.

That's a motion that's pending before me. It will be

fully submitted shortly. You'll get a ruling.

If I say it's clear to me there's no ambiguity here, then I care even less than I might care otherwise about what they think; objectively, subjectively, parol evidence, not parol evidence, it's over. If I were to rule -- and I've got a motion pending, which Delaware did not, that's the biggest difference. The judge there says, This issue is not pending before me yet; it has to be fully discovered; who knows; we are not getting the motion; the motion will come.

In the meantime, you collect all the evidence, I've taken a different position. I say, You want to tee it up now? It is up to you. I'll take the motion; I'll decide the motion as a matter of law. So none of what you're seeking will be of any interest to me if on these papers I can determine the question of ambiguity.

Now, if the win is that I find it is ambiguous, that's when these subpoenas maybe should be considered.

MS. GUERON: Well, but, your Honor, there are a couple of points to say in response to that.

First of all, that's exactly the question that was facing Judge Glasscock.

THE COURT: No, no, it wasn't. I've got a motion ready to decide. It stays away. Your brief is due -- not yours, but CEC's brief is due tomorrow; reply brief, who knows. Anybody here for plaintiff?

MR. CRICHLOW: August 6.

THE COURT: August 6th?

MR. CRICHLOW: Yes.

MS. GUERON: But, your Honor --

THE COURT: Well, hold on.

August 6. It is fully submitted. With some luck, chambers are pretty fast chambers in deciding things, there will be a decision.

As I said, if I find it unambiguous as a matter of law, I don't know what you're seeking from them then, because what you're interested in is any evidence that would be useful should the Court determine that it is ambiguous and I may need to consider further evidence, we call it parol evidence, but evidence that is beyond the terms of the contract. Then this may be of interest.

You'll have my ruling shortly.

Now, you might say, But I'm up against an August 31st deadline. Yeah, but whose deadline is that? And who has the power to change that deadline? So that's not a good argument. Because if I were to decide ambiguity, since I set August 31st, I can also unset it. That's the power of an Article III judge. She makes the date and then she can change the date.

MS. GUERON: That is certainly true, your Honor.

But as parties, as defendants facing billions of dollars in liability, we issue a subpoena because there's an

August 31st discovery deadline.

THE COURT: For sure.

But now the question is should I quash it, should I stay it. I know you issued it; that was the right thing to do; that's what I would have done if I had your job.

Okay. You issued it. A little overbroad, I might add, No. 12 really is -- what was the word? Awestruck. Your clients were awestruck. I don't like that word; it's like creating the universe in seven days, it may have been an awesome thing. Okay. That was a little bit of a reach.

But put it aside, you did your job, you issued a subpoena. That's not my issue there. I'm not critical on your issuing a subpoena. The question is should I quash it or stay it.

I'm about to decide ambiguity. And as I said, if I were to decide that it's unambiguous, what would be left of your subpoena then, in your opinion? That was kind of a tough question I asked your adversary. If the ruling is this is unambiguous, then what? What do you need their stuff for then?

MS. GUERON: Your Honor, I go back to the language of the complaint. The allegation is that this information, this guaranty, was essential to the consideration they received.

THE COURT: So?

MS. GUERON: Tell us why. Should us the documents demonstrating --

THE COURT: Why? What is the relevance of that to this lawsuit? What issue will it resolve to know why they invested? Who will care?

If I were to determine -- and I'm far from knowing that right now, don't take this hypothetical as a ruling, my goodness. But if I were to determine that it is unambiguous, the term is unambiguous, the guaranty clause unambiguous, what do you need any of this stuff? What would be left relevant to this lawsuit if I were to conclude that?

Let's not go down the other road, if I were to conclude it is ambiguous, we'll come back, we'll be right back in the room, and the day after the ruling, say, Okay, ambiguous. Now, let's narrow this thing. Let's get to the critical material. What do they have; what do you need?

MS. GUERON: There are issues of the meaning of the guaranty. If you say it's unambiguous, I suppose the meaning -- we still don't know which way you are finding it unambiguous. Do you see what I'm saying?

THE COURT: No.

MS. GUERON: Does it mean that all three preconditions are conjunctively required or not?

THE COURT: That's what "unambiguous" would mean; that "and" is and, not "or."

MS. GUERON: It could be unambiguously the other way, which is that if you read these three provisions, it is

illogical to assume that each must be required.

THE COURT: So you're saying I could also find this unambiguous because it means "or."

MS. GUERON: It cannot mean "and."

THE COURT: Don't argue the merits to me.

MS. GUERON: I'm not, your Honor.

THE COURT: UMB is here, but not prepared to argue the merits of the pending brief.

MS. GUERON: Nor are we, your Honor. Our briefing is coming in shortly. It is absolutely premature to speak to the merits.

As to No. 12, I do think it is important to state on the record that we have spoken and met and conferred and we offered to withdraw No. 12 in an effort to narrow and get to the kernel of the documents we wanted and need.

THE COURT: Good. I didn't know that.

MS. GUERON: Yes, your Honor. We offered to withdraw No. 12; we offered to limit No. 9, so that it really got to the key issues. The documents and communications concerning the parent guaranty and the release conditions --

THE COURT: That's good.

MS. GUERON: -- and the effect of the guaranty and its termination, and the effect of the 2014 transactions which are or are not deemed restructuring, was that related to the TIA, we really had a meet-and-confer. We said, If we can focus on

these, that will be the start of our production, and we'll pull No. 12.

They weren't interested in such a negotiation, I think because they wanted to come here and quash the entire subpoena.

THE COURT: I thought they were interested in a narrowing.

Mr. Hamerman, were you not interested in a narrowed subpoena?

MR. HAMERMAN: We certainly were, your Honor. The issue was they were willing to withdraw No. 12, but only on condition that we conceded everything else. And since we think there are other areas to narrow, as well --

THE COURT: That's right. I saw your footnote; your footnote said that.

MR. HAMERMAN: Correct.

THE COURT: I did read that.

So he did concede that you were ready to withdraw No. 12.

MS. GUERON: Yes, and to limit No. 9, and to defer all of their deadlines.

Your Honor, as to the August 31st discovery deadline, if your Honor were to push that deadline back --

THE COURT: Not now.

MS. GUERON: -- not just in this case --

THE COURT: Not now.

MS. GUERON: Well, okay. So if not now, we are in the position where they have just expressed for the first time, not in their letter, but for the first time stating here that there is some kind of burden facing them. It is a little bit rich, both literally and figuratively --

THE COURT: Well, they wrote burden in the letter, they just didn't itemize it.

MS. GUERON: Well, a conclusory reference to the word --

THE COURT: Hold on, hold on.

These are premotion letters. I mean they are limited to three pages, single-spaced.

MS. GUERON: Indeed.

THE COURT: As long as he raises the burden in the letter, he's raised it; he's preserved it. He doesn't have to do it there. He's just asking to make a motion. I don't think I need a briefing motion; I think I know where I'm heading here. But he did preserve the objection on burden, he just didn't explain it.

MS. GUERON: Well, saying the word "burden" without explaining what the burden is --

THE COURT: I understand, but in a three-page premotion letter. This is not a motion yet.

MS. GUERON: I understand, your Honor.

THE COURT: You requested permission to make a motion

to quash. So I don't think he can be held to have waived anything.

Okay. Go ahead.

MS. GUERON: My only point is we didn't know what we were opposing, given no description of the burden.

Hearing from noteholders that hold 2.2 billion in notes as of December -- we don't know the dollar number as of today -- it is a little bit rich, literally and figuratively, for them to say, Well, it is burdensome to search email. Sure it's an email search, and technology will assist. And if they are worried about privilege, they can do search terms that preclude lawyers' names. There's a million technological solutions to that. There's a lot of money at stake. This is not a small player coming in and waiting.

THE COURT: This is not a small case.

MS. GUERON: The burden arguments really do not seem to be serious here, your Honor.

THE COURT: But the burden argument is always intertwined with the yield. You don't go through a burden of -- I'll make it up -- a million-dollar expenditure when you're drilling in a dry well. And so what he says is, Look, what could we possibly have that's really going to help to resolve any issue that is before the Court? And that's a key question. We are not part of the negotiations as to the release, that's for sure. We may have views on it, we have our

legal views, we think they are still in effect. I get that. That's what the case is about, whether these guaranties are still in effect or not.

So I don't care about their opinion in the end; it's really the Court's opinion and higher courts' that will resolve that issue, not some lawyer's view or some party's view, right? It's a legal issue before the courts.

MS. GUERON: Well, it may be, your Honor, but, no, this is not a fishing expedition.

THE COURT: I didn't accuse you of fishing either. I'm trying get to relevance, I really am.

MS. GUERON: We have gotten, in the dribs and drabs of discovery that have started to come in from other noteholders in other parallel cases, evidence that the market did not view the parent guaranties as providing credit support for these notes, specific evidence on that point. There's nothing in the indentures that were strict CEC from later transactions. Evidence like that shows that market participants did not see these guaranties and did not read the termination provisions the way the plaintiffs are urging the Court to.

Now, maybe your Honor will hear that.

THE COURT: What other actions are there? I thought I had five, Delaware has one, and there's the bankruptcy.

MS. GUERON: Yes, your Honor. This is discovery coming in from the cases that are in front of you.

THE COURT: Here, the five here?

MS. GUERON: That's right.

THE COURT: Okay.

MS. GUERON: Yes. So we are seeing evidence that the interpretation of the contract proffered by the plaintiffs is not the way the market viewed it.

Now, again, your Honor, of course, will be the one to decide whether or not that information is ultimately admissible. But it is premature now. We need to gather that information, and then we can make the arguments about is it admissible or not.

Cases on summary judgment or post-trial where a court says, Okay, I've seen that evidence and I'm not going to look at it, those come later; that decision comes later. Right now we are just saying, Allow us to gather the evidence, your Honor, so we can evaluate and contest --

THE COURT: Well, it's not the inadmissibility argument that's of interest to me. I understand that the Rule 26(b)(1) says that discovery need not be admissible in evidence to be discoverable. That language is there now and it's going to be there on December 1st. But what's not going to be there on December 1st is "reasonably calculated." You know that 26(b)(1) is changing. You know that, right?

MS. GUERON: I can't say that standing here this moment I knew that.

THE COURT: It's gone. It's gone.

The "reasonably calculated" language that you cite all over your letter and old cases, they are now old -- I've got a letter in front of me -- you cite 2006, you cite 2004, you cite older cases, I'm going to apply the new rule. I'm going to apply the December 1st rule. The "reasonably calculated" is gone.

MS. GUERON: We think it's relevant straight out.

THE COURT: I just want you to know that it's a narrow definition now. And there is new language in 26(b)(1) that's going into effect on December 1 about proportionality. And in evaluating proportionality, the very first factor -- and they were reordered as the new rule got written -- is the importance of the discovery resolving the issue.

Now, you may say, That's fine with me because I think I've satisfied that --

MS. GUERON: It is, your Honor.

THE COURT: -- factor 1.

Mr. Hamerman says just the opposite.

Our internal opinion is after the fact we weren't part of this thing. That will not resolve the issue, which is an issue of law. And I'm not the court of last resort. It's the district court, the circuit court, the highest court. But the courts will do it. And what he thought or what the markets thought may not be of interest if I determine that there's no

ambiguity. It says what it says.

As I said -- now I'm going to repeat it. I don't like repeating, but that's what it comes down to. If it is ambiguous and if there is a need for evidence outside the four corners of the document, I will revisit this. I would think to start to require this now makes no sense in this case.

MS. GUERON: Your Honor, just to speak to this, I think we absolutely do satisfy whatever Rule 26 will one day be.

THE COURT: It's not one day; it's December 1st.

MS. GUERON: Okay. But it's July now.

THE COURT: I understand that.

Many courts are starting to apply the new rule now because it's inevitable; it's past all the hurdles.

MS. GUERON: But, again, these requests are not unmoored from the binding document here, which is the complaint. The complaint says that this consideration was essential to these nonparties. Subpoenaing these nonparties --

THE COURT: No, wait, wait.

I understand it was essential it these nonparties. Mr. Hamerman probably wouldn't deny that. But even so, what does that prove? How does that proof resolve an issue in this case that it was essential or important to their investment? I'm sure it was. I'm sure the guaranty was important to them.

MS. GUERON: The point is it is premature now to rule

this discovery unavailable, when we haven't --

THE COURT: I'm not ruling it unavailable; it just makes no sense now, when I'm going to rule on ambiguity.

Where I'm really confused is so there is this allegation in the complaint that they didn't write. And it says -- that these nonparties didn't write. And it says these guaranties were important to them.

Let's say Mr. Hamerman were to stand and concede that, Yup, the guaranties were important to us when we made our investment decision. So what? Where would that help me in resolving this lawsuit as to whether the release of them was appropriate and legal and violated the contract or not? How does knowing that that was important to him when he invested in 2009 -- not him, but his clients, in 2009, '10, '11, that it was an important consideration to them then, which I don't doubt, by the way, regardless of whether he stands and says so, I'm sure it was important to have that guaranty. So what? What does knowing that change my lawsuit or affect my lawsuit?

MS. GUERON: No, your Honor. To the contrary, it is our position that as we are starting to see in some of the documents produced, that allegation isn't so.

THE COURT: You think it wasn't important.

MS. GUERON: Right.

They say, because it was theoretically valuable, that it was important.

THE COURT: Wait, okay. Okay.

I want to take your hypothetical. So now if you were to stand and say, Okay, the guaranties weren't important to us, that wasn't part of our strategy in investing at all, we could care less, let's say he says that, okay, how does that affect?

MS. GUERON: The reason that's relevant, your Honor, is that the guaranties did not provide credit support. In other words, our understanding of what really happened here and what the market knew was happening was that CEC provided what is effectively a guaranty of convenience that permitted CEOC to issue notes using their consolidated financial -- using, excuse me, CEC's consolidated financial statements.

The guaranty was not thought of as some kind of ultimate backstop. That, as a matter of fact, objective fact about what the market thought these guaranties meant, matters; because it shows your Honor that the "and" interpretation of Section 12.02 is illogical on its face and is not what the market understood. And so the practice and the understanding of the market on this complicated termination clause is relevant because --

THE COURT: But now you're conflating the market with the subjective documents of these five investors. You talked about custom and practice in your letter. And he writes back, That has to be not the subjective opinion of one or two or ten of our employees, but it has to be a fixed and immutable

practice in the industry. That's what we are really talking about.

Their view of whether this was an important part of their decision to invest or not doesn't make it a custom and practice in the industry.

MS. GUERON: They characterize the subpoenas as seeking subjective information. That's not what these requests are. These requests follow the familiar formula of requesting all documents concerning various topics drawn straight from the complaint. All documents. So, in other words, what are the market analyses that you are relying on.

THE COURT: Okay. Then he says, You want to get analyst reports? Go get them. They are publicly-available.

MS. GUERON: I don't think many of them are.

THE COURT: Oh.

MS. GUERON: I don't think that's accurate.

THE COURT: Oh, okay.

Mr. Hamerman, why did you tell me they were publicly-available?

MR. HAMERMAN: I believe that they are.

THE COURT: Well, she believes they are not. Can you talk to each other?

MR. HAMERMAN: We certainly can, your Honor. If it comes to that, we will certainly discuss it.

THE COURT: All right. Go ahead.

MS. GUERON: So, your Honor, there's nothing inherently subjective about the documents called for. Some of the documents that we're asking for --

THE COURT: Yes, there is. You said "all." So in requesting all, that would include internal communications where one desk says to the other desk, Well, I don't think this is important or, Oh, I think this is very important. "All" would include that. So of course it includes subjective.

MS. GUERON: Right. I'm just saying they characterize the subpoena as calling for solely subjective. It calls for objective and subjective.

But the internal investment thesis of these noteholders is what the complaint says is the proof that the parent guaranty --

THE COURT: I lost you. The internal what?

MS. GUERON: Investment thesis.

THE COURT: I know. I'm missing a word. Internal investment.

MS. GUERON: Thesis.

THE COURT: Thesis?

MS. GUERON: Reason. Logic. The internal logic of why to invest or why to hold.

The plaintiffs say, That is going to prove how much these noteholders relied on this guaranty. It's a reliance argument, fundamentally.

And what we are saying is, to the contrary, what it would show is everybody knew this guaranty could be terminated in a variety of ways, some of which were easier than others. That is the point of the argument. And that's why the information --

THE COURT: Excuse me. Go ahead. Sorry.

MS. GUERON: -- is important and goes directly to the allegations of the complaint. This is not the creation of the defendants. This is the complaint that we are responding to and want to rebut.

THE COURT: This is an interesting argument; I'm certainly enjoying it, I don't know if you are, but --

MS. GUERON: Very much.

THE COURT: Is reliance an issue in this case? I'm not here on a 10b-5. I'm not here on an investment case. Do I care whether they relied on the promise of a guaranty from CEC to make this investment? This is not a securities fraud case; it's a contract case. I don't know whether reliance is ever going to be a triable issue.

So after I do this ambiguous/not ambiguous, let's go back to the decision treatment. Let's say I say that it's not ambiguous, does that still leave the issue of reliance in this case?

MS. GUERON: Your Honor, honestly, to answer that I'd have to be putting myself in the plaintiff's shoes to explain

how they are going to plead and argue their case and then rebut it. I don't know.

I know that as a defendant, I am trying to defend against a complaint that says that a guaranty that we believe was a guaranty of convenience, was integral to decision-making. And to rebut that, we are trying to show that it wasn't.

THE COURT: Your argument has been very helpful. I understand now more of why we want this, to rebut an argument or an allegation in the complaint. But I guess I wondered whether anything would be left of that argument if the terms of the clause are not ambiguous. Then I wonder if reliance isn't left in the case. But, okay, you say you shouldn't have. The answer to that, you're not the plaintiff. Okay.

MS. GUERON: And one thing, your Honor, that I would like to speak to is you've made some mention to, well, perhaps the discovery deadline is moved.

THE COURT: Sure. Depending on maybe the outcome of this motion.

MS. GUERON: That's right, your Honor.

I guess from the defendant's perspective what's important is that there are many cases here, and they are consolidated. So moving one deadline does not help CEC; they are all moving on track.

THE COURT: Well, yes and no. If I recall, some of the other plaintiffs didn't want to have the motion; they

weren't ready to make the summary judgment motions. One was, one wasn't. So they are really not on the same time frame anymore anyway. It sounds like that date may have to move.

MS. GUERON: One other point I would like to make.

THE COURT: I wasn't ready to do it today, but maybe I will after this argument.

MS. GUERON: Another point I'd like to make, your Honor, is that you've said, Well, I'm going to have in front of me a motion that will decide ambiguity.

Now, the summary judgment motion focuses on the Trust Indenture Act. So it is not construing the parent guaranty clause; it is focusing on the 2014 transactions and whether those impaired the noteholders. So the motion is not addressed to the contract claim, and your Honor may not be deciding ambiguity on this summary judgment motion.

THE COURT: I'm getting mixed up. Whose motion? It's your motion?

MS. GUERON: It is the plaintiff's motion.

MR. CRICHLOW: Your Honor, it is our motion.

THE COURT: Do you agree with that last argument?

MR. CRICHLOW: She is correct. The first summary judgment motion is limited to whether the Trust Indenture Act has been violated.

THE COURT: True. But in deciding that, do I have to construe that clause and decide whether it is ambiguous or not?

MR. CRICHLOW: You do not necessarily have to to make that ruling, your Honor, but you also could.

THE COURT: The issue is briefed, isn't it?

MR. CRICHLOW: Right. We have not briefed the "and/or" issue. UMB has not. I cannot recall what BLKF did in theirs because I don't have their brief in front of me, but we did not brief the "and/or" issue.

THE COURT: But you don't know if BLKF did.

MR. CRICHLOW: I can't recall. I don't want to make a representation either way.

THE COURT: That's okay.

MS. GUERON: My understanding from co-counsel is that they did not brief that "and/or" issue.

So, your Honor, this puts us back closer to Judge Glasscock saying it is premature to ask me to hold off and quash subpoenas, when the "and/or" issue isn't before me.

Your Honor, you're closer to Judge Glasscock than I think you originally described it, because the summary judgment papers that are rolling in right tomorrow don't define that issue. And so, faced with the August 31st discovery deadline, we must proceed and get these documents now.

THE COURT: About to get what documents. That's another troubling part of your argument. I must get these documents.

What you've asked for is the universe. You want

everything they have. I mean you did, at least when you wrote No. 12, which is a problem because it's colored my view.

But even if we get back to this investment, what documents really do you want? You seem to want their initial investment strategy in the sense of did they say something that would show that these guaranty clauses were just irrelevant to them, it wasn't part of their -- they didn't care.

MS. GUERON: It's fundamental, your Honor. The kernel of what we want, there's a finite universe of internal analytical documents that talk about the investment thesis or the logic for buying Caesars notes. It looks to external documents and their internal documents, objective and subjective.

THE COURT: Why did they buy the notes?

MS. GUERON: Why did they buy, why did they hold, why did they sell. And, in part, that would certainly be about the financial health of the company and, in part, it will be --

THE COURT: Did they particularly focus on this guaranty one way or the other.

MS. GUERON: Correct, your Honor.

THE COURT: Okay. I understand.

Okay. I think I've understood your argument. I'm going to end up reserving.

Mr. Hamerman.

MR. HAMERMAN: I'll try to be very short.

Summary judgment, your Honor, if it's not on the "and/or" issue, it's still dispositive of the entire case. That's still out there, right. So there's no need to decide today, because the summary judgment motion will be dispositive of the entire case.

Reliance. This is not a fraud claim; this is not a fraud case. There is no element of reliance.

Our views, whenever we had them, do not inform whether there was a breach of the contract or not, which is the issue, or whether there was a violation of the Trust Indenture Act or not.

THE COURT: So you're saying now, taking this hypothetical, you were to stand and say, Okay, we concede that these guaranties, when we went in, were not important to us; it was just not in consideration; we could care less. We even knew that they weren't there for all time. You're saying even if that's true, it doesn't matter.

MR. HAMERMAN: That's what I'm saying, your Honor.

THE COURT: That's what you're saying.

MR. HAMERMAN: Yes.

THE COURT: That it doesn't matter.

MR. HAMERMAN: Correct.

THE COURT: Because there is a contract and it says what it says.

MR. HAMERMAN: Right.

THE COURT: But she says the motion is not even under the contract claim, and Mr. Crichlow agreed with them and said it's on the TIA.

MR. HAMERMAN: Either way, the motion is dispositive of the entire case. As your Honor actually said, in granting permission to make the motion, this would be dispositive of the entire case; it would put this whole issue to bed.

That's all I have, unless you have more questions.

THE COURT: No. Probably back to Ms. Gueron for one last question.

So if it's dispositive of the entire case, if summary judgment is granted to UMB, I would think the next step is an appeal, not discovery, but an appeal.

MS. GUERON: Yes, if one loses, then yes.

THE COURT: That's what I mean. Seriously, it's over in the district court. There's no part of the case left, or is there? Is it a 54(b) problem, because only on the TIA claim and the remaining claims -- the case still lives on the remaining claims. You have to take a 54(b) judgment to get up there, I would think. It's not dispositive of the entire case if it only moves on one claim.

I'm just thinking out loud.

MS. GUERON: First what I would say, your Honor, is, again, right now we're living in a universe where we have a discovery deadline in six weeks.

THE COURT: I know that. I'm aware of that.

MS. GUERON: We have to proceed with discovery now.

THE COURT: I'm aware of that.

I'm still saying what's the response to his argument that it's dispositive of the case? If the plaintiff succeeds in summary judgment, are there remaining claims open that have to be dealt with in the district court or are they ready to wrap it up and go to the circuit?

MS. GUERON: I can't answer that.

THE COURT: Do you have an answer for that, Mr. Crichlow?

MR. CRICHLOW: Your Honor, yes, I do.

As counsellor has rightfully pointed out to the Court, the Court had noted itself and granted --

THE COURT: Forget what I said. I'm asking you. Because I now see that it's only on the TIA claim. There are other claims in the case. I don't know if you can just go up or whether you need a 54(b), something that allows you -- not you, but --

MR. CRICHLOW: Your Honor, I think the decision, if it were favorable to UMB, would be okay; it would render the other counts moot.

THE COURT: It would dismiss them to get a final judgment?

MR. CRICHLOW: We could. Under the TIA count, if you

agreed with us, the guaranty would be put back in place.

THE COURT: You have to dismiss the other counts; you have to have a final judgment.

MR. CRICHLOW: I agree with that, your Honor. I think the other claims would be moot because it would just yield the same result.

THE COURT: As long as the party says so. I can't do that. The party would have to say, We'll dismiss the remaining claims to have a final judgment.

MR. CRICHLOW: I'm sorry, your Honor. I did not mean to interrupt you.

Again, we would reserve all of our rights today, because we are speaking in hypotheticals. But I'm trying to be as helpful as I can.

THE COURT: I get it. But you can't say that today, what you would do if you won the TIA.

MR. CRICHLOW: That's correct, I can't say definitively. But my personal view sitting here is that it would render the other claim moot.

THE COURT: I understand. The plaintiffs would have to say that to get a final judgment that could go up and there wouldn't be any discovery.

MS. GUERON: I do just want to make one other point, your Honor, which is that we've been acting as the discovery here could only relate to the contract claim, cannot be related

to the TIA claim. And that's not exactly right, your Honor. I just want to point that out.

The question about whether the release of the parent guaranty impairs the rights of the noteholders -- and "impairs" is an important operative word in the TIA.

THE COURT: No, right, it is, yes.

MS. GUERON: It goes to this "and/or" question. Because if the guaranty and the release provisions are as the defendants believe they are, there has been no impairment under the TIA. And so it is an element of the TIA.

THE COURT: True. But, remember, they have nothing to do on the release end. As this hour has passed, yes, they have documents as to why they initially went in, and you take that past the investment, to the holding, to the selling or the not selling, we get through the whole period. But they are a part of the negotiation as to the release itself. So the impairment and all that, they won't have records.

MS. GUERON: I must disagree. It is the same calculus, which is what their internal analysis is as they continue to hold these notes through these transactions. It's the same analysis. Are these releases valid or are they saying internally, Oh, no, these releases can't possibly be valid.

THE COURT: What does it matter what they say? These are legal issues. It is hard for me to accept. It was one thing when you said they might have relevant evidence as to how

to interpret the clause. But now you're going past that and saying what they think about the releases matters. Can't be. That's got to be law.

MS. GUERON: No, to the contrary, your Honor, whether or not they are impaired, you have to know what the note gives them before you understand whether or not something has been taken away.

THE COURT: That's right.

MS. GUERON: So you have to interpret the note. It comes back to a contract analysis, but also in the TIA claim it comes back to a contract analysis.

THE COURT: It can't be on the release end; they weren't part of it. And what they think about it really is like litigation strategy. We know what the plaintiffs think of it: They sued. When UMB sued, BLKF sued, we know what they think of the release.

MS. GUERON: Again, it is what the market -- how does the market read this conduct.

THE COURT: Who's the market now? You've subpoenaed five investors. I don't believe what they individually think about the release has any legal significance at all, I must tell you.

Okay. I think we've really gone over this issue very thoroughly. I want to think through a little more, but I have grave doubts that I can enforce it as written right now. So

even orally now I'm inclined to say I'm partially granting the motion to quash because it's overbroad. But you know that because you offered to rewrite it.

So maybe the next thing to do is speed the processes. Please issue an amended subpoena with copy to me as fast as you can, which is word processing; it's not so hard. Take the one you wrote, take into account today's oral argument and the issues we've discussed, and make it as narrow as you can. That will help me write or issue a quicker ruling, if I can get the amended subpoena language promptly, very promptly. Because as it stands, I have to quash it, at least in part. So I'd rather you rewrote it based on your own willingness to withdraw certain ones and whatever you take away from this oral argument as to how to tailor it. That will help.

MS. GUERON: Very well.

THE COURT: Okay.

MR. HAMERMAN: Should we then submit revised objections, revised letters?

THE COURT: I don't think so. I think I need to just see the revised subpoena and rule.

MR. HAMERMAN: Thank you, your Honor.

THE COURT: I don't think I need another letter. I know your view; you've expressed it. You've had a lot of time. I was generous with both sides. I understand your point of view. And Ms. Gueron has heard it, too. She's heard my

reactions to it. I think a revised subpoena would be really the best next step before I make any final ruling.

So the current one is not in play and you don't have to respond until you get the amended one. And then I will essentially say you move to quash it again, and I'll rule.

MR. HAMERMAN: Thank you, your Honor.

THE COURT: Or you move to quash it and/or to stay it, and I will rule.

MR. HAMERMAN: Or to further modify.

THE COURT: Well, that would probably require another letter. That you move to quash the amended subpoena or stay it, I will take it as a given. But if you want to further modify it and are prepared to respond to some of it, that would be a somewhat new ballgame. So that you can write about or negotiate about once you see it. You have several options once you see it.

But I don't need you to reinstate we move to quash and/or stay. That I get. Quash in full and/or stay, I understand those two. But if it's to modify or you want to negotiate, great.

MR. HAMERMAN: Here's my concern, your Honor: I think what we are going to get is a subpoena that takes away No. 12.

THE COURT: Don't predict what you're going to get. You're going to get what you get.

MR. HAMERMAN: Okay. But there's still this dispute

between us as to market practice and our subjective views.

THE COURT: Don't predict what you're going to get. There has been an hour in court of argument. I know there probably will be a fast request for a transcript. They are going to amend that subpoena. I don't know exactly how it will be amended, neither do you.

So when you get it, you do not have to reinstate the request to move to quash and/or stay. But if you want to now talk about modifying or you want to negotiate with the adversary, those you're welcome to do.

MR. HAMERMAN: Thank you.

MS. GUERON: Your Honor, as a timing matter, we will do this as expeditiously as you directed. We would prefer not to build in another two weeks as we would normally be required.

THE COURT: No. It rests in your hands at the moment.

MS. GUERON: No, I mean that the response -- normally in a two-way subpoena you must give the other side two weeks. Theoretically then we could be waiting for two more weeks to ever re-up this argument.

THE COURT: That's not long. What was the date on the subpoena?

MS. GUERON: July 10th was the date, your Honor.

It's only long because August 31st is the discovery deadline.

THE COURT: I understand.

MR. HAMERMAN: Here your Honor is envisioning no response whatsoever. What your Honor is saying is you'd still take our letters as applicable to the new subpoena.

THE COURT: Correct.

MR. HAMERMAN: So there is no response. They don't have to wait two weeks; they don't have to do anything.

THE COURT: No, no, that's not what she's saying. She's saying the subpoena requires a response in two weeks. Is the trigger date for those two weeks from the date of the amended subpoena, that was her question, that's her only question, not letter-writing and all of that.

MR. HAMERMAN: I understand.

But I think what your Honor was saying is our objections are still interposed.

THE COURT: Correct.

MR. HAMERMAN: And our letter is still interposed.

THE COURT: That's all true.

MR. HAMERMAN: So we wouldn't have a response to the subpoena.

THE COURT: Response is production. She's saying is the production date two weeks after I give the Court the amended subpoena or do I have to give them the same full 14 days.

MR. HAMERMAN: Since your Honor is still treating the motion to quash as applicable --

THE COURT: That's right. So you're saying what was pending you don't have it.

MR. HAMERMAN: There is no production anyway, unless we agree --

THE COURT: Wait, wait. Let me clarify.

Are you saying a motion to quash stays a nonparty's obligation to respond to a subpoena, that by making a motion the clock stops? Is that what you're saying?

MR. HAMERMAN: I think our objection, which says we are not going to be providing documents --

THE COURT: So the objection stops the clock until the Court rules.

MR. HAMERMAN: Correct.

THE COURT: Okay. My job is to rule. Right.

So what he's saying is the amended subpoena, it's not that it gives him another 14 days; it gives him until the Court rules. Do you understand, Ms. Gueron?

MS. GUERON: Sort of. But it's got to be a facially valid subpoena, your Honor. Therefore, it has to have a return date.

THE COURT: Okay. Well, put anything you want. Is that one of those where the Court can shorten the date as it chooses?

MS. GUERON: I don't believe so under the rules.

What we would like to do is use the same July 10th

date. Call this an amended subpoena with the same July 10th date.

THE COURT: Okay. But it's not going anywhere till I rule.

MS. GUERON: Certainly. July 10th has passed. But it's a little bit of an artifice, but it allows us --

MR. HAMERMAN: That's fine with us, Judge.

THE COURT: That's fine. Because nothing can happen till I've ruled and I see the amended subpoena.

MR. HAMERMAN: Okay.

THE COURT: So when do you hope to get it without holding you to it? The hope.

MS. GUERON: Today or tomorrow.

THE COURT: Okay.

MS. GUERON: Which means, just to be fair to us, we probably will not have the benefit of the transcript, so we will do our best to digest everything that we've heard.

THE COURT: Okay. And also, once he gets it in hand, it may be that another meet-and-confer is a wise idea. One more when he gets the amended subpoena. One more shot at talking to each other in person or on the phone might be wise before the Court has to rule.

MS. GUERON: Yes, your Honor.

MR. HAMERMAN: We agree.

THE COURT: All right. Good. Thank you.

MS. GUERON: Thank you.

THE COURT: Will you be ordering it, however, at the fastest possible speed? I don't know when you'll get it, but will you order it at the highest --

MS. GUERON: Yes, we will.

THE COURT: Because it will be helpful to the Court, too.

MS. GUERON: Yes, we will.

THE COURT: Okay. Thank you.

MR. HAMERMAN: Thank you, Judge.

MR. CRICHLOW: Thank you, your Honor.

THE COURT: You're all set.

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